No. 103.

Brief of Atty. Gen. (Hoyt) for Appt

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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### STATEMENT.

The appellee imported from Canada into the United States, in June, 1895, eight carloads of boards and planks planed on one side and grooved or tongued and grooved. The collector assessed a duty of 25 per cent on the imports as a manufacture of wood under paragraph 181 of the tariff act of August 28, 1894, which is as follows:

> House or cabinet furniture of wood, wholly or partly finished, manufactures of wood or of which

wood is the component material of chief value, not specially provided for in this act, twenty-five per centum ad valorem.

The importer protested, claiming that they should have been admitted free of duty as dressed lumber under paragraph 676 of said act, which provides for "sawed boards, plank, deals, and other lumber, rough or dressed." The Board of General Appraisers sustained the action of the collector, and the importer filed an application for review in the circuit court, which reversed the decision of the board. On appeal by the United States to the circuit court of appeals, where the case was heard by two judges, who were divided in opinion, the judgment of the circuit court was affirmed.

The case is brought before this court on writ of *certiorari*, the question to be determined being whether the importations were properly classifiable as "dressed lumber" under paragraph 676.

The articles were sawed boards or planks, and are described in the specifications (Rec., pp. 6–8) as being planed on one side and grooved, or planed on one side and "matched"—that is, tongued and grooved (p. 114), and some were "butted to exact lengths." They are prepared for use by a machine described by most of the Government witnesses as a "flooring machine" (pp. 71, 110, 116, 120, 125, 132, 135, 144, 149), which is a combination of a simple planing machine with a matching—or tonguing and grooving—machine. Some of the smaller mills use separate machines for planing and matching (p. 129), the combination machine appearing to be of comparatively recent origin (p. 26).

The forty-seven witnesses examined before the Board of General Appraisers were almost equally divided on the question whether lumber which was tongued and grooved as well as planed has passed beyond the term "dressed lumber," the Government witnesses confining the term to lumber that had been put through a planing machine, but had reached no further stage of manufacture, and was not intended for any particular purpose or use. The importer's witnesses gave a much broader meaning to the term "dressed," holding that lumber which had been planed, grooved, tongued, or beaded was still dressed lumber, even when in final shape for the carpenter to put together as flooring, roofing, ceiling, etc.; but it was admitted by witnesses on both sides that in ordering such articles the term "dressed lumber" would not sufficiently describe them, and they are usually ordered either by description or by their specific designation as flooring (pp. 20–21, 24–25, 28–30, 32, 46, 52, 91, 122). One of the Government witnesses, when asked how he would fill an order asking simply for dressed lumber, replied (p. 47):

> A. We would deliver it to them dressed one side and one edge or two edges, or with just facing, unless it was specified to the contrary if they wanted them dressed both sides.
>
> Q. You would not tongue or groove them unless they specified that?
>
> A. No, sir; we would face it and send it to them just faced one side; dressed lumber.

Another witness stated (p. 64):

> If a man sent me an order for dressed lumber, I would consider that anything planed on one side

> would fill the bill. * * * If a man sent me an order for dressed lumber, and I dressed and matched it, I think he would have good reason to kick.

It appears that after lumber has been planed on one or both sides, if it undergoes any further process it assumes some name such as sheathing, or base, or flooring (pp. 21, 24). The process of planing, tonguing, and grooving is usually all the work of one machine (pp. 116, 120, 130, 163, 173, 212), but is not done simultaneously. "It is done on the same machine, but after it is dressed it is passed on to the matcher, the tonguer, and the groover" (p. 110). Government witnesses stated that by the term "dressed" was understood the planing of lumber to an equal thickness, either on one side or two (pp. 114, 120, 133, 137, 138, 139, 141, 144, 145). The terms "planed" and "dressed" are used synonymously (pp. 16, 152).

## ARGUMENT.

### I.

THE IMPORTATIONS ARE EITHER MANUFACTURES OF WOOD, OR ARTICLES PARTLY MANUFACTURED NOT OTHERWISE PROVIDED FOR.

It was admitted by witnesses, both for the importer and for the Government, that the article as imported was ready for use by the carpenter and in condition to be laid down at once as flooring, or used as ceiling, without any further manufacture (pp. 21, 88, 101, 166). On this

point one of the importer's witnesses testified as follows (p. 101):

Q. What is that used for in its present state?

A. Flooring; it could be used for ceiling.

Q. Ordinarily, flooring?

A. Yes, sir.

Q. The only thing need to be done to that to make a flooring of it would be to butt it to the exact length and lay it down?

A. Yes, sir; it is ready to go on the floor as it is.

Q. When that was in the floor, and composed the floor, you would call it then dressed lumber?

A. Yes, sir.

Q. It would never change?

A. After it is once dressed it can not be put back in the rough state.

Q. You say it is all ready to make a floor?

A. Yes, sir.

Q. The only thing necessary to be done is for the carpenter to lay it down and drive a nail in it?

A. Yes, sir; he puts it down and planes it afterwards.

Q. That is simply to even it up?

A. Yes, sir.

Another witness for the importers, when asked to differentiate between manufactured lumber and dressed lumber, said (p. 39):

> I should call dressed lumber anything that would go through a machine and dress in any form in one machine or one process, and *manufactured lumber* would be, perhaps, lumber that is made into shooks or *cut for trim to a special length, so that it would be adapted without any further work upon it to put right into place.*

And another witness gave the following (p. 44):

> Q. Would you consider that Exhibit 2 manufactured wood?
>
> A. Yes, sir; it is manufactured the same as flooring is manufactured; * * * it is manufactured to a certain point.
>
> Q. You would consider that Exhibit 2 manufactured wood?
>
> A. Well, as I say, to a certain point; yes. It is not absolutely finished until it is cut into lengths.

It is not necessary, however, that the articles should be in final shape for the consumer.

In *United States* v. *Hathaway* (4 Wall., 404), where the article under consideration was "a quantity of white-ash timber, split in the form of pipe and hogshead staves at the place of importation," Mr. Justice Nelson said (p. 408):

> If it has undergone the process of manufacture, even in part, it is taken out of the free list.
>
> In the present case the article is prepared by splitting for the hand of the cooper in the manufacture of the pipe or hogshead, a process which has the effect to relieve him from much of the labor that would otherwise be required in adapting it to the use intended. It has already been reduced to the proper form and size, a work which in the first stages of the manufacture of the hogshead must be done, and by which a considerable advance is made in fitting and finishing it for the market.

In *United States* v. *Quimby* (4 Wall., 408), decided at the same time, "616 cords of split white-ash timber, chiefly designed to be used in the manufacture of long shovel handles," were held to be within the provision of

the tariff act of March 2, 1861, relating to all articles manufactured wholly or in part not otherwise provided for.

In *Erhardt* v. *Hahn* (14 U. S. App., 117, 120), a manufacture is defined as follows:

> Where an article has been advanced through one or more processes into a completed commercial article known and recognized in trade by a specific and distinctive name other than the name of the material, and is put into a completed shape, designed and adapted for a particular use, it is deemed to be a manufacture.

In that case the articles in controversy were penholder handles, glove-hook handles, shoe-hook handles, knife handles, etc., which had still something further to be added before they could be sold by the retailer. In *In re Herrman* (14 U. S. App., 416); *Arthur* v. *Butterfield* (125 U. S., 70); *Seeberger* v. *Cahn* (137 U. S., 95); and *White* v. *United States* (38 U. S. App., 230), the articles held to be manufactures were mere dress fabrics. In *United States* v. *Schoverling* (146 U. S., 76), they were gunstocks. In *Worthington* v. *Robbins* (139 U. S., 337), certain enamel, not in condition for use as imported, was held to be an article partly manufactured. In *Robertson* v. *Gerdan* (132 U. S., 454), pieces of ivory for piano keys were held dutiable as manufactures of ivory. In *Isaacs* v. *Jonas* (148 U. S., 648), cigarette paper and pasteboard covers of corresponding size, imported separately, and intended to be bound together into cigarette books, were held to be "smokers' articles" under the tariff act of March 3, 1883.

In the case of *In re Kursheedt Manufacturing Company* (14 U. S. App., 35), which held certain velveteen facings to be manufactures, the court said (pp. 38, 39):

> We think the evidence clearly shows that the articles in controversy have lost their commercial identity as velveteens and are a manufactured article. Not only have they been advanced to a form in which they have *acquired a new commercial name, and are adapted for a distinctively new use*, but they have been subjected to a process consisting of several steps, which requires a considerable amount of skill and labor.

In the recent case of *Tide Water Oil Company* v. *United States* (171 U. S., 210), certain box shooks imported from Canada, which were planed and cut into the required lengths and widths for making into boxes, were held to be articles partly manufactured. The court gives the following definition of the word "manufacture" (p. 216):

> The primary meaning of the word "manufacture" is something made by hand, as distinguished from a natural growth; but, as machinery has largely supplanted this primitive method, the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. Ordinarily the article so manufactured takes a different form, or at least subserves a different purpose from the original materials, and usually it is given a different name. Raw materials may be, and often are, subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product.

Counsel for appellee lays some stress on the fact that the tonguing and grooving process is performed on one machine and substantially at the same time. But this does not affect our contention. Formerly the tonguing and grooving was a separate and considerably more expensive process than now, and lumber so treated was always expressly provided for in the tariff acts, a higher rate of duty being laid thereon than on the merely planed article. It was then plainly regarded as a manufacture, and can it now cease to be so considered simply because the tonguing and grooving is done by another branch of the planing machine, and almost immediately thereafter? "A trifling amount of labor is often sufficient to change the nature of the article and determine its classification." (*Saltonstall* v. *Wiebusch*, 156 U. S., 601, 604.)

The case of *Hartranft* v. *Wiegmann* (121 U. S., 609), relied on by counsel for the appellee, does not conflict with the authorities above cited. The articles there in controversy were shells which had been cleaned, ground, and etched; but, as the court said, "they were still shells," and were held to be "shells not manufactured," and not "manufactures of shells."

## II.

### THE IMPORTATIONS ARE NOT DRESSED LUMBER WITHIN THE MEANING OF THE ACT.

It is admitted by nearly all of the witnesses that the articles are bought and sold by the thousand feet, like lumber. This appears to be done for convenience of the

trade (p. 108). It is dressed lumber in so far as anything made of wood which has been planed is dressed. As one witness remarked (p. 127):

> It is lumber in a sense that a door is lumber, or moldings are lumber, or the parts of a table before it was put together was lumber, or that my coat is cloth.

It was even maintained (pp. 90, 101) that, in one sense, a floor may be called dressed lumber after it has been laid down. But it is respectfully submitted that an article which has been sufficiently advanced in manufacture to be known by such denominations as "flooring, ceiling," etc., can not properly be called "dressed lumber." The moment it is tongued, grooved, or contains any other evidence of the handiwork of the mechanic than the mere planing, it becomes a manufacture of wood prepared and designed for some evident purpose or use, and is then taken out of the category of lumber "dressed" or "undressed" and its use limited. When a thing is manufactured, at that moment its use becomes restricted and it is intended for some specific purpose on the part of the manufacturer. Rough or dressed lumber may be converted into any use, but when tongued or grooved it becomes a manufacture of wood, and, as has unanimously been testified in this case, is known as flooring, sheathing, etc., and as such is liable to a duty as a manufacture of wood.

The dictionary definitions of the verb "dress" are somewhat indefinite. The Century gives the following: "To cut or reduce to the proper shape or dimensions or evenness of surface, as by planing, chiseling, tooling,

etc., * * * as to *dress* lumber." The Standard: "To cut, plane, or furrow, etc., a surface (as of wood * * * )." Knight's Mechanical Dictionary: "Smoothing the surface of plank or of stone." In an old Treasury decision (S. S. 204, Sept. 14, 1864), referred to in the decision of the Board of General Appraisers in this case, dressed lumber is defined as "lumber, planed, turned, smoothed, or having undergone a similar process, but not mortised, tenoned, tongued, or grooved."

The word "dressed" is evidently intended as equivalent to "planed" in the present act. The tariffs of 1872, 1883, and 1890 provided duties on lumber "planed or finished," and always imposed an additional rate on lumber tongued and grooved. The present act substitutes the word "dressed" for "planed" and omits mention of lumber tongued and grooved, thus leaving it to be classed among the nonenumerated manufactures of wood, or articles not otherwise provided for. "Sugar-box shooks" and "packing-box shooks," dressed lumber in substantially the same stage of manufacture as that now under consideration, are specially mentioned in paragraph 180; and in the free list we find articles of lumber which have advanced so far in manufacture as to acquire a special designation, but which are intended to be admitted free of duty, such as clapboards, pickets and palings, shingles, and staves of all kinds.

Tariff acts are presumed to be framed after a careful examination of commercial conditions, and are to be interpreted in the light which a knowledge of those conditions affords. (*United States* v. *Blumlein*, 14 U. S. App., 101.)

## III.

### THE EXPERT EVIDENCE SUSTAINS OUR POSITION.

The Board of General Appraisers found that so far as the expert evidence was contradicted the testimony was equally balanced. The disputed testimony does not concern any real question of commercial designation. It is admitted that the term "dressed lumber" would not be a sufficient description of these articles. They are usually ordered either by description or by their specific designation as "flooring." In *Recknagel* v. *Murphy* (102 U. S., 197, 200), Mr. Justice Swayne explains the theory of commercial designation as follows:

> In cases like this, the law recognizes the authority of those engaged in commerce, and adopts, necessarily and as conclusive, the meaning which they have given to words and phrases *employed in their daily business.*

Although the Board of General Appraisers held the conflicting testimony in this case to be inconclusive, and the circuit court threw it out altogether (p. 180), there is some practically uncontradicted expert evidence which bears strongly on the case and is in favor of the Government's contention, namely: that dressing is equivalent to planing; and that this article which has been tongued and grooved, as well as planed, and then cut to lengths for use in laying down a particular floor, has so far proceeded in manufacture as to have received the well-known commercial designation of flooring.

## IV.

### THE COLLECTOR'S DECISION MUST BE PRESUMED TO BE CORRECT.

It is a well-established rule in customs cases that the presumption is always in favor of the collector's decision. (*Arthur* v. *Unkart*, 96 U. S., 118; *Erhardt* v. *Schroeder*, 155 U.S., 124; *United States* v. *Rosenwald*, 35 U.S. App., 89; *United States* v. *Pickhardt*, Id., 72.)

Counsel for appellee argues the point with much earnestness that the tariff act of 1894 was enacted as a free-trade measure and that its purpose was to reduce duties on articles of general consumption, and it is pointed out that if our contention were sustained and this importation held dutiable as a manufacture of wood the rate of duty thereon would be considerably greater than that imposed by any previous tariff act. His reasoning is upon the assumption that where two or more rates of duty are applicable to an article the lowest rate should prevail, in accordance with past decisions of this court. This presumption, however, was reversed in 1883 by an amendment to section 2499 of the Revised Statutes, and the last sentence of section 4 of the tariff act of 1894 provides that—

> If two or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates.

By analogy, the same reasoning should apply when under one provision of the tariff act of 1894 lumber is

placed in the free list, and when manufactured is subject to duty. Moreover, although by placing this article under section 181 the duty would be increased more than 50 cents per thousand feet, there is nothing to show that such was not the express intention of Congress; and while under the former law the rate was lower, there is yet nothing to show that the conditions prevailing at the time of the passage of the act of 1894 were not such as to specially appeal to Congress in favor of a higher rate. Further, while it is conceded that the general purpose of the tariff act of 1894 was to provide for the reduction of duties, a comparison of that act with the tariff of 1890 will show an increase of duty on many articles of general consumption, among which appear the following: *Sawed boards, deals, planks* of cedar, lignum vitæ, * * * and all other cabinet woods, percentage of increase, 66.66; wire rope and strand, made of galvanized steel, etc., increase, 212.58; wire covered with cotton, etc., increase, 140.10; wire cloths, etc., 81.04; brass in bars or pigs, 0.30; rivets of iron or steel, 20.31; cork bark, 160.42.

It is respectfully submitted that the judgment of the circuit court of appeals should be reversed.

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